Onan, a Division of Ona Corporation *and* United Auto, Aerospace & Agricultural Implement Workers (UAW), International Union. Cases 10-CA-18628 and 10-CA-18797

30 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 30 June 1983 Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Onan, a Division of Ona Corporation, Huntsville, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The judge inadvertently dates the Union's request for bargaining over employee Smart's discharge as 11 October 1982. The correct date is 4 October 1982.

The judge found that in its 17 August letter the Respondent admitted it was in the process of *upgrading* job classifications. We find that the Respondent merely acknowledged that it was in the process of *updating* job classifications. (See the Respondent's letter which is set out in full in the judge's decision.)

[2] In agreeing with the judge that the Respondent violated Sec. 8(a)(5) and (1) by refusing to bargain with the Union about Armstrong's pay grievance, we disavow any possible implication that the judge may have created in fn. 8 of his decision that the parties are *required* to agree that Armstrong is owed any amount of backpay. See *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). We also note that *Shaw College*, 232 NLRB 191 (1977), cited by the judge in fn. 8 is inapposite, since there is no finding in this case that Armstrong is entitled to backpay.

Since he concludes that the Respondent engaged in unlawful conduct by refusing to discuss employee Armstrong's grievance over an evaluation describing him as a "[u]nion pusher," Member Hunter finds it unnecessary to pass on any other theory of a violation the judge set out. Member Hunter also notes that the Respondent offered to give Armstrong that document when he complained about it, but that Armstrong refused to take the evaluation. Nonetheless, in the absence of evidence that the Respondent has taken the appropriate remedial action, Member Hunter adopts the judge's order directing that the document be expunged from all files the Respondent maintains.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This case was heard in Huntsville, Alabama, on March 15 and 16, 1982. Included are two complaints and amendments. The first complaint, Case 10-CA-18628, issued on December 2, 1982, and was predicated on a charge which was filed on October 18, 1982, amended on October 28, 1982, and second amended on November 29, 1982. An amended complaint in Case 10-CA-18628 issued on January 6, 1983. Subsequently, a complaint issued on March 2, 1983, showing in its caption Cases 10-CA-18797 and 10-CA-18628. That complaint referred to a charge, evidently Case 10-CA-18797, which was filed on December 13, 1982. The General Counsel made other amendments during the hearing herein. As shown hereinafter, the complaints allege that the Respondent engaged in various activities in violation of Section 8(a)(1), (3), and (5) of the Act.

On the entire record, and from my observation of the witnesses, and after consideration of the briefs filed by the General Counsel, the Charging Party, and Respondent, I make the following

FINDINGS OF FACT[1]

I. BACKGROUND

An organizing campaign was conducted by the Union at Respondent's facility during the spring of 1979. An election was held on June 22, 1979. The Union received 189 votes, 179 votes were cast against the Union, and there were 33 challenged ballots.[2] Subsequently, pursuant to unfair labor practice charges and objections to the election filed by the Union, the Board found that Respondent had engaged in various 8(a)(1) violations and in 8(a)(5) refusal-to-bargain violations. In the decision noted above, the Board ordered Respondent to recognize and bargain with the Union.

Shortly after the Board's decision issued on May 28, 1982, a union membership campaign was initiated. The instant allegations occurred around the time of the summer 1982 membership campaign.

II. EMMETT SMART

In several complaints and amendments,[3] the General Counsel alleges that Respondent violated Section 8(a)(1)

[1] The commerce facts and conclusions are not at issue. The complaint alleges, the answer admits, and I find that Respondent is a Delaware corporation with offices and a place of business located at Huntsville, Alabama, where it is engaged in the manufacture of gasoline engines, generators, and other products, and is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. The complaint also alleges, the answer admits, and I find that United Auto, Aerospace & Agricultural Implement Workers (UAW) International Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[2] See 261 NLRB 379.

[3] It is the practice of the instant Regional Office of the Board, and perhaps other Regional Offices as well, to issue unconsolidated complaints in a single unfair labor practice proceeding. The instant case involves an example of that practice.

Continued

and (3) by disciplining and discharging, and Section 8(a)(5) by refusing to bargain about the discharge of, former employee Emmett Smart.

A. *The 8(a)(3) Allegation (re Smart)*

I have considered Smart's August and September 1982 disciplinary warnings and discharge against elements normally considered by the Board in assessing 8(a)(3) complaints.

1. Knowledge of Smart's union activities

Both Emmett Smart and Ezell Whorten[4] testified about Smart's union activities. Smart testified that he was first active in the Union's 1979 campaign and subsequently in their 1982 membership campaign.

Smart testified that in 1979, he wore a union hat, shirt, and button, and helped sign employees to union authorization cards. In 1982, according to Smart, he solicited employees to sign union membership cards, told employees of union meetings, signed a membership card himself, and he wore a union hat and T-shirt and kept a union button on his machine at work.

Ezell Whorten also testified about Smart's union activities. Whorten played a prominent role in the prior unfair labor practice litigation (see 261 NLRB 1379), and in the 1979 and 1982 union campaigns. Whorten's testimony herein about Smart's union activities was limited to Smart's activities in 1982. Whorten testified that Smart was one of three or four employees asked by Whorten to assist in soliciting employees to sign union membership cards in 1982. Whorten stated there were about 300 employees at Respondent's facility. According to Whorten, Smart did help in getting employees to sign union membership cards in 1982.

However, Respondent denied knowledge of any of Smart's union activities. Smart's immediate supervisor, Carolyn Zuhn, testified that she was aware there were some union activities starting in May 1982. However, according to Zuhn, she did not see Emmett Smart wearing union insignia, and union activity played no part in Smart's discharge. Zuhn also denied having any conversation with Ezell Whorten concerning Smart's discharge.

Ezell Whorten testified before Zuhn. Whorten testified that, about a week after Smart was discharged, Carolyn Zuhn asked Whorten if he were angry because she had fired one of his union supporters.

Whorten also testified that around mid-July to the first of August,[5] Carolyn Zuhn came up while he was giving Emmett Smart some union cards and asked what he had. Whorten replied that he had "damn union cards." Smart's testimony corroborated Whorten on the July 20, 1982 "damn union cards" incident involving himself, Whorten, and Carolyn Zuhn.

2. Timing

Smart was discharged by Respondent on September 2, 1982. The union membership campaign was initiated in May 1982. Smart's immediate supervisor allegedly knew of his involvement with union activist Ezell Whorten by mid-July 1982.

Therefore, it is apparent that, from the standpoint of proximate time, the date of Smart's discharge raises suspicion as to the legality of Respondent's motive.

3. Animus

There is no doubt from a reading of the prior case (see above 261 NLRB 1379) that Respondent strongly opposed the Union.

4. Motivation

Respondent contended that Emmett Smart was discharged on September 2, 1982, because his production continued to be low. After his supervisor warned him on three occasions, she set production minimums which Smart failed to achieve.

Smart admitted to Respondent's assertion that he had a history of production problems. He admitted that in addition to warnings from his last supervisor, Carolyn Zuhn, he was also cautioned about his production and about other work-related difficulties by all save one of his prior supervisors. Smart admitted that when cautioned by those other supervisors, he improved his productivity. Respondent points to that admission as the distinguishing aspect of Smart's discharge. According to Supervisor Carolyn Zuhn, Smart failed to improve following her warnings. Surprisingly, Smart admitted that his productivity decreased during August 1982. However, Smart contended that his decrease in productivity was because of a defective spindle clutch on his machine—the P.J. 400.

Respondent did not deny that the P.J. 400 had a defective spindle clutch. The spindle clutch was replaced the week after Smart's discharge. However, Respondent offered testimony that the defective spindle clutch did not adversely affect productivity on the machine. Respondent pointed out that following Smart's discharge but before the spindle clutch was replaced, employee Neal operated the defective machine at a speed which greatly exceeded Smart's rate (i.e., 88.8 percent for Neal; Smart 51.27 percent on September 2 and 41.39 percent on September 1, 1982).

In a complaint, G.C. Exh. 1(g), which issued on December 2, 1982, the General Counsel alleged the Respondent discharged Emmett Smart on September 9, 1982, in violation of Sec. 8(a)(1) and (3).

In an amended complaint, G.C. Exh. 1(j), which issued on January 6, 1983, the General Counsel alleged that Respondent issued reprimands to Smart in August 1982, and discharged Smart on September 2, 1982, in violation of Sec. 8(a)(1) and (3).

Finally, in a complaint, G.C. Exh. 1(r), which issued on March 2, 1983, the General Counsel again alleged that Respondent discharged Smart on September 2, 1982. However, in that complaint, the General Counsel alleged that Respondent failed to bargain with the Union following the Union's request to bargain about, inter alia, Smart's discharge. The March 2, 1983 complaint did not include an allegation of 8(a)(3) violations, but instead alleged violations of Sec. 8(a)(1) and (5). This last complaint was subsequently amended at the hearing.

Fortunately, the Region's refusal to simplify its complaint procedure does not appear to have resulted in harm to other parties in this instance.

[4] Although spelled Horten in the transcript, both Respondent and the General Counsel spelled this witness' name as Whorten.

[5] Whorten testified this incident occurred before Carolyn Zuhn became a supervisor. Zuhn was promoted supervisor on July 29, 1982.

The General Counsel argues that Smart was treated in a disparate manner. In support of its position, the General Counsel points to Respondent's Exhibit 13 which shows efficiency ratings for five employees that ran the P.J. 400 between August 1, 1982, and September 5, 1982. The General Counsel argues that the records illustrate that among the five employees listed on Respondent's Exhibit 13 alleged discriminatee Smart did not consistently score lower than all four other employees.

B. *The 8(a)(3) Factual Findings on Disputed Elements*

1. Knowledge

In consideration of the evidence regarding knowledge, I have carefully examined the testimony of the three critical witnesses, Emmett Smart, Ezell Whorten, and Carolyn Zuhn.

I was impressed by Smart's demeanor and testimony. His responses to cross-examination, and especially the questions which proved that his productivity has been poor under a series of supervisors, were impressive. I find that Smart was a truthful witness.

Unfortunately for the General Counsel, I did not find Ezell Whorten as candid as Smart. During cross-examination, it appeared that Whorten tried to embellish his testimony by exaggerating his knowledge of facts which would tend to support the General Counsel. For example, for the first time, even though Whorten previously testified to Regional Office investigators, he remembered that Emmett Smart commented to the effect that Carolyn Zuhn was motivated because of Smart's union activities. Moreover, I noticed that Whorten's role in the previous hearing before Administrative Law Judge Evans (see 261 NLRB 1379 supra) was remarkably similar to his position in the instant case. There, as here, a supervisor allegedly disclosed to him facts which would tend to support a case for an illegal discharge. Administrative Law Judge Evans found Whorten's demeanor was questionable. Due to the above considerations, and my observation of Whorten's demeanor, I am unable to credit Whorten's testimony to the extent that it was not supported by other credited evidence.

As to Supervisor Carolyn Zuhn, I was generally impressed with her testimony. In fact, in most areas her testimony agrees with that of Emmett Smart. However, I found disturbing Zuhn's testimony regarding her knowledge of Smart's union activities. Zuhn did not deny that on one occasion before she became supervisor she saw Ezell Whorten give union cards to Emmett Smart, nor did she deny asking Whorten what the cards were. Moreover, Zuhn admitted that she knew of the employees' union activities beginning in May 1982. Nevertheless, she denied knowledge as to any of Smart's union activities including knowledge that Smart wore a union hat, shirt, maintained a button on his machine at work, and solicited other employees to sign union membership cards. I am unable to credit Zuhn's testimony in that regard.

I specifically find that in July 1982 Carolyn Zuhn observed Ezell Whorten giving union cards to Emmett Smart. Zuhn asked and was told by Whorten that the cards were union cards.

However, due to my discrediting Ezell Whorten, I find that Zuhn did not go to Whorten after Smart's discharge and ask if Whorten was angry because Zuhn had fired one of his union supporters.

2. Motivation and disparity

The record established, without rebuttal, the following regarding Emmett Smart's productivity during the short period he was under the supervision of Carolyn Zuhn.

On August 3 and 4, 1982, shortly after Zuhn became his immediate supervisor, Smart's daily performance efficiency statistics reflect that his productivity was higher than the average in his department. Thereafter, on successive workdays in August 1982, Smart's performance efficiency was as follows:

Date	*Percentage*
Aug. 5	74.38
Aug. 6	73.13
Aug. 9	67.88
Aug. 10	30.00
Aug. 11, 12 and 13	Vacation
Aug. 16	51.38
Aug. 17	55.50

On August 17, 1982, Carolyn Zuhn called Emmett Smart into the office after having had earlier informal discussions with him about his productivity. Smart complained about the mechanical operation of his machine. Subsequently, Zuhn had Industrial Engineering Technician Tim McCarley check out the P.J. 400. According to McCarley's report to Zuhn and his testimony in the instant hearing, the P.J. 400 was actually running faster than standard on that date, even though its spindle clutch was slipping. Zuhn showed McCarley's figures to Smart, and Smart agreed that he would put forth a 100-percent effort.

Subsequently, the daily performance efficiency records for August 1982 show the following as to Emmett Smart:

Date	*Percentage*
Aug. 18	26.33
Aug. 19	44.00
Aug. 20	46.00
Aug. 23	47.25
Aug. 24	44.80

Again on August 24, Zuhn called Smart into the supervisor's office. She pointed out to Smart that instead of improving, he was backsliding. Smart mentioned adjusting his tooling or that the machine was running slower. Zuhn then used a stopwatch and timed Smart's operation on the P.J. 400. She took her figures to Tim McCarley and was told that in consideration of those figures, Smart's production should be 95 percent. Zuhn informed Smart what she had been told by McCarley. Zuhn then set a goal of 89 percent for Smart. Smart indicated that he felt the goal was fair.

Subsequently, Smart's figures for August 1982 showed:

Date	*Percentage*
Aug. 25	46.03
Aug. 26	33.25
Aug. 27	Off Work
Aug. 30	37.68

Zuhn planned to discuss Smart's performance with him on August 27. However, due to Smart's being off on August 27, Zuhn met with Smart on August 30. Because of Smart's continued low production, Zuhn issued a written warning to Smart that date. The warning stated, inter alia, "continued poor performance will result in your termination."

Following August 30, Smart's figures for 1982 showed:

Date	*Percentage*
Aug. 31	52.13
Sept. 1	41.39
Sept. 2	51.27

Another meeting was scheduled with Smart on September 3. However, before that date, Smart asked to be off on Friday, September 3. Zuhn told Smart that the problem with his work was serious. Nevertheless, Smart insisted on taking off due to a doctor's appointment. Smart indicated he was having sinus problems. With that, the Zuhn-Smart meeting was moved to the afternoon of September 2.

At the September 2 meeting, Zuhn and another supervisor, Don Zimmerman, had Smart's production figures through the preceding day (September 1). During the meeting, Smart was told that he was being terminated due to his consistently low production.

Carolyn Zuhn testified that Smart differed from other employees that received warnings for low production by his failure to improve following counseling.

C. *Legal Conclusions*

As shown above, the credited evidence proved that, before becoming supervisor, Carolyn Zuhn learned of Emmett Smart's involvement with known union pusher Ezell Whorten, by observing Whorten giving union cards to Smart. Smart wore union insignia on his person and machine in full view of Zuhn. Additionally, the record supports the General Counsel in elements of timing and union animus.

However, Respondent advanced as its justification for the discharge of Smart a business-related motivation which was not overcome by the General Counsel. The record clearly demonstrated that Smart's efficiency ratings continued to be low throughout the month of August 1982, despite discussions, warnings, and a written reprimand from his supervisor. Supervisor Zuhn then set production quotas which Smart failed to even approach. She issued a warning to discharge absent improvement. Yet, despite all those danger signals, Smart never achieved a reasonable level of productivity.

The General Counsel points to Respondent's Exhibit 13 as demonstrating disparity. However, the employees, other than Smart, mentioned in that document were not full-time P.J. 400 operators. Nevertheless, the productivity figures show that occasional operators oftentimes operated the P.J. 400 at a higher efficiency rating than did Smart, the regular operator. Those other operators including Neal, operated at a higher efficiency than Smart at times when the machine's spindle clutch was defective.

Therefore, I find under the rationale of *Wright Line*, 251 NLRB 1083 (1980), that regardless of the General Counsel's prima facie case, Respondent proved that Emmett Smart would have been discharged in the absence of his union activities. I recommend that the 8(a)(3) allegation be dismissed.

D. *The 8(a)(5) Allegation as to Emmett Smart*

Following Smart's discharge on September 2, 1982, the Union on October 4, 1982, requested Respondent to bargain about Smart's discharge. On October 11, 1982, Respondent refused the Union's request.

As mentioned above, Respondent was ordered to bargain with the Union on request by the Board's May 28, 1982 Order.[6] That case is now pending a determination as to enforcement by the Eleventh Circuit Court of Appeals. For the sake of this litigation, I must, and do, presume that the Board's Order is a valid one which will be enforced by the court.

Discharge is a mandatory subject of bargaining, and Respondent erred in refusing the Union's request in view of the Union's status as exclusive bargaining representative. However, it is not alleged, and the evidence did not show, that Smart was discharged because of unilateral changes in working conditions, in violation of Section 8(a)(5). In fact, a reading of the prior case (see above, 261 NLRB 1379) demonstrates that it was Respondent's practice, at that time, to discharge employees for low production. A unilateral change would necessitate a remedy including reinstatement. However, that is not the case here.

The typical 8(a)(5) remedy, which is appropriate here, requires restoration of the status quo ante. Here, the status quo is that which was in effect on October 11, 1982, the date the Union requested negotiations over Smart's discharge. In other words, Respondent has no obligation to reinstate Smart with backpay before negotiations over his discharge. Those negotiations may or may not result in agreement to reinstate Smart.

I find that the General Counsel's reliance on cases which it asserts would require traditional 8(a)(3) remedy for Smart's discharge, including backpay and reinstatement, are misplaced in view of my findings above.[7]

E. *Roger Armstrong*

The allegations going to Armstrong include 8(a)(1) and (5) allegations that Respondent maintained a document in Armstrong's file which identifies him as a union pusher, that Respondent has since July 15, 1982, refused to pay Armstrong the proper wage rate, and Respondent has refused the Union's request that it bargain about both of those issues.

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[6] Supra, 261 NLRB 1379.

[7] Unlike the situation in authority cited by the General Counsel including *Shaw College*, 232 NLRB 191 (1977), the evidence did not show that Respondent was obligated to notify and bargain *before* discharging Smart.

1. Did Respondent refuse to properly classify Ray Roger Armstrong?

In the past 2 years, Respondent introduced a diesel program. That program, plus what Respondent's manager of quality assurance characterized as a need to be better organized, ultimately lead Respondent to reclassify some of its jobs.

Until January 1983, Roger Armstrong was classified as J-III inspector. Other classifications at that time included the positions of inspector specialist and industrial engineering technician. Both the inspector specialist and the industrial engineering technician positions included higher maximum pay scales than the J-III inspector job.

During the summer 1981, Roger Armstrong was transferred into the "gear lab." While in the gear lab, Armstrong's duties included duties which he felt fell within the scope of the industrial engineering technician job description.

On August 3, 1982, Armstrong filed a written grievance with Respondent claiming that he was performing technician duties. Armstrong requested that he be upgraded "to at least an inspector specialist."

On August 10, 1982, the Union, in a letter to Respondent's Manager Don Fore, requested Respondent to meet and bargain over, inter alia, Respondent's "refusal to pay Roger Armstrong the proper pay rate."

Armstrong's grievance was denied by Respondent. In a note dated August 17, 1982, Manager of Employee and Community Relations Ronald Polk wrote the following regarding Armstrong's request:

> Due to numerous changes over the past two years, with the introduction of the diesel engine, changes to and additions of new manufacturing methods and inspection procedures, current job descriptions are outdated. Job tasks that were historically associated with a particular job classification may or may not now be included in the same job classification. This will not be known until all job descriptions are updated. Efforts to update all job descriptions within the QA department are underway.
>
> Request for upgrading cannot be approved at this time.

On August 18, 1982, Plant Manager Fore wrote the Union denying its request to bargain over the Roger Armstrong pay rate grievance.

Eventually, Respondent completed its upgrading of various job descriptions. In January 1983, Roger Armstrong was reclassified "layout inspector." That position was created in January 1983. It did not exist at the time of Armstrong's grievance.

2. Findings

In view of the above evidence, there appears to be no doubt that Respondent violated Section 8(a)(5) of the Act by refusing to bargain regarding Roger Armstrong's pay rate. As shown above, Respondent's obligation to recognize and bargain with the Union was clearly established by the Board's Order dated May 28, 1982 (261 NLRB 1379).

Moreover, the evidence, including the above-quoted August 17, 1982 note from Ronald Polk, demonstrates that from before the Union's August 10, 1982 demand to bargain about Armstrong's grievance, Roger Armstrong was performing duties which exceeded the scope of the J-III Inspector position. Respondent acknowledged in its note to Armstrong, both the need to upgrade his job classification and the fact that it was in the process of actually upgrading job classifications.

The above facts show two distinct bases through which Respondent had an obligation to meet and bargain with the Union. First, of course, there was an outstanding grievance from Roger Armstrong which was being considered by Respondent. As Armstrong and his fellow employees' bargaining representative, the Union was entitled to negotiate over that grievance.

Secondly, Respondent's ongoing reclassification process evidences the occurrence of a change in working conditions. Since that change affected unit personnel including Armstrong, the Union was entitled to consideration and an opportunity to negotiate before the new classifications were unilaterally installed.

Therefore, I find that Respondent violated Section 8(a)(5) by refusing to negotiate from the Union's August 10, 1982 request, regarding the job classification and proper pay rate for Roger Armstrong.

However, I specifically find that the General Counsel failed to prove that Roger Armstrong functioned within the scope of other job classifications which existed during 1981 and 1982. In that regard, Roger Armstrong expressed belief that he was functioning as a technician from the time he was assigned to the gear lab. Armstrong pointed in particular to the fact that he was training inspectors and others, and the fact that he programed the computer.

The record demonstrated that while Armstrong evidenced a sincere belief that his duties were those of a technician, he was not actually functioning at that level. In actuality, what the record demonstrated was that Armstrong familiarized others, including a technician, with the machines in the gear lab. Familiarization with gear lab machinery does not qualify as a duty within the job description of a "technician." That job description requires that technicians must be able to "train inspectors in all phases of inspection." No evidence was offered to show that Armstrong was so qualified. The familiarization process did not serve to train people to become inspectors. Persons that had previously qualified as inspectors required familiarization whenever they changed to different machinery. That was the type training performed by Armstrong.

Similarly, the evidence failed to show that Armstrong possessed the capability of programing computer-assisted measuring machines. The record demonstrated that technicians programed the computers in order to permit others to feed into the computer the measurements of the various gears handled by Respondent from time to time. Armstrong's duties included feeding those gear measurements into the preprogramed computer—a function totally different from the programing function.

Therefore, my Order shall not include a recommendation that Roger Armstrong is entitled to backpay measured in relation to the 1982 pay classifications of either technicians or inspectors specialist. My recommended Order will require Respondent to bargain with the Union under conditions as they existed when the Union made its August 10, 1982 request. The result of that bargaining should be retroactive to August 10, 1982. While Armstrong was performing above the J-III Inspector position during August 1982, he was not performing as an "Inspector Specialists" or as an "Industrial Engineering Technician."[8]

2. The "Termination Evaluation"

From a July 27, 1979 layoff until discovered by Roger Armstrong in the summer of 1982, Respondent maintained a completed termination evaluation questionnaire in Armstrong's personnel file which identified Armstrong as a "union pusher." As illustrated during the instant hearing, that document was available for examination by Armstrong along with various supervisory employees.

3. Findings

Obviously Respondent maintained the above-mentioned document in Armstrong's file in violation of the provisions of Section 8(a)(1) of the Act. That provision of the Act proscribes the interference, restraint, and coercion of employees in the exercise of protected activities, including union activities. Here, the questionaire in material respect, as to Roger Armstrong, stated:

> Weak points? Union pusher.

That notation has the tendency to coerce and restrain Armstrong and other employees that learned of its existence.

When Armstrong complained about the termination evaluation, Respondent offered the document to Armstrong, but he refused to accept the evaluation. However, Respondent refused to bargain with the Union about Armstrong's grievance regarding the evaluation.

Technically, Respondent was obligated to bargain with the Union as its employees' exclusive collective-bargaining representative regarding Armstrong's grievance. With that in mind, I find that by maintaining the evaluation in Armstrong's file and by refusing to bargain about Armstrong's grievance over the evaluation, Respondent violated Section 8(a)(1) and (5).

From a practical standpoint, it is difficult to determine how Respondent could engage in the give-and-take process of negotiations over a matter which was prohibited by law. Therefore, in my recommended remedy, I shall recommend that the evaluation must be expunged[9] from Respondent's files and that Respondent be required to post an appropriate notice. I shall not recommend that Respondent be ordered to bargain regarding Armstrong's grievance over the termination evaluation. Such an order would be moot in view of my Order that the evaluation be expunged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Auto, Aerospace & Agricultural Implement Workers (UAW), International Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining in its files a document which identifies its employee as a "union pusher," Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. All production and maintenance employees employed by Respondent at its Madison, Alabama, facility including all work leaders, quality control inspectors, and testing technicians, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. At all times material herein, United Auto, Aerospace & Agricultural Implement Workers (UAW), International Union, has been, and is, the exclusive collective-bargaining representative of the employees in the above-mentioned appropriate unit.[10]

6. By refusing to bargain with the Union regarding the discharge of employee Emmett Smart and the grievances of employee Roger Armstrong, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

7. Respondent has not otherwise engaged in violations of unfair labor practices alleged in the complaint.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

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[8] Since Armstrong performed in the gear lab before Respondent was obligated to recognize and bargain with the Union, I find that General Counsel failed to prove that Respondent violated Sec. 8(a)(5) solely by refusing to properly pay Armstrong. There was no showing that Respondent's refusal to pay Armstrong at a rate higher than that due a J-III inspector constituted a unilateral change. Backpay, which may be due Armstrong under the rationale of *Shaw College*, supra at fn. 7, because of Respondent's refusal to bargain over Armstrong's grievance, may be determined, if necessary, in compliance proceedings.

[9] Although the record shows Respondent tried to remove the termination evaluation from Armstrong's file in 1982, the evidence does not show that Respondent took any action to remedy the effects of its maintenance of that document. Moreover, the document should be expunged from all files of Respondent and its agents, and not simply from Armstrong's personnel file.

[10] See *Ona Corp.*, 261 NLRB 1379 (1982).

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Onan, a Division of Ona Corporation, Huntsville, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining, and coercing its employees in the exercise of rights guaranteed them in Section 7 of the Act, in violation of Section 8(a)(1) of the Act, by maintaining in its records a document which identifies its employee as a "union pusher."

(b) Refusing to bargain collectively with United Auto, Aerospace & Agricultural Implement Workers (UAW), International Union, as the exclusive representative of its employees in the following appropriate bargaining unit, with respect to the rates of pay, wages, hours of employment, and other terms and conditions of employment by refusing to bargain regarding the discharge of employee Emmett Smart and the grievances of employee Roger Armstrong:

> All production and maintenance employees employed by Respondent at its Madison, Alabama, facility including all work leaders, quality control inspectors, and testing technicians, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is deemed to be necessary to effectuate the policies of the Act.

(a) Upon request by the Union, meet and bargain with the Union as exclusive representative of its employees in the above-described bargaining unit regarding the discharge of employee Emmett Smart and the proper pay grievance of employee Roger Armstrong in the manner set forth above in this decision.

(b) Expunge from its files any reference to Roger Armstrong as "union pusher" and notify the Union and Armstrong, in writing, that this has been done, and that the reference to him as a union pusher will not be used as a basis for future personnel action against him.

(c) Post at its Madison, Alabama facility copies of the attached notice marked "Appendix."[12] Copies of said notice on forms provided by the Regional Director for Region 10, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

[12] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain documents in our files which identify our employee as a "union pusher" because of our employees' union activities.

WE WILL NOT refuse to bargain collectively with United Auto, Aerospace & Agricultural Implement Workers (UAW), International Union, as exclusive collective-bargaining representative of our employees in the appropriate bargaining unit described:

> All production and maintenance employees employed by Respondent at its Madison, Alabama, facility including all work leaders, quality control inspectors, and testing technicians, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to bargain on request by the Union, regarding the discharge of our employees, or regarding grievances filed by employees in the appropriate unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees with respect to their exercise of rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL, on request by the Union, rescind our actions in denying the grievances of Emmett Smart and Roger Armstrong and restore the status quo ante by reconsidering those grievances through negotiations with the Union at the state of proceedings as they existed when the Union made their respective request to bargain regarding those matters.

WE WILL expunge from our records any reference to Roger Armstrong as a "union pusher," and WE WILL notify the Union and Roger Armstrong in writing of our action in that regard.

ONAN, A DIVISION OF ONA CORPORATION